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No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL AND EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

In light of this Court's holding in *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), that the Equal Protection Clause of the Fourteenth Amendment requires voting districts to be drawn so "that the vote of any citizen is approximately equal in weight to that of any other citizen in the State," is it unconstitutional for a State to significantly dilute the votes of some citizens to the benefit of other citizens by drawing districts based on total population, including those who are residing in this country unlawfully and are therefore not part of the body politic?

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, the stated mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. One of the most important of those principles is the idea that legitimate governments derive their just powers from the consent of the governed, and the Center has participated in numerous cases before this Court and elsewhere that involve one or another application of that principle, including *Sisney v. Reich*, 131 S.Ct. 2149 (2011); *Angle v. Guinn*, 541 U.S. 957 (2004); and *United States v. Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

In its "one-person, one-vote" body of jurisprudence, this Court has repeatedly focused on the need, under the Constitution's Equal Protection Clause, to equalize the relative weight of each *voter*. Total population has in the past been an adequate proxy for the eligible voter population, but the reasoning of this Court's prior cases requires that eligible voter population rather than total population be used when there is a significant divergence between the two, in order that the *votes* of some citizens are not diluted when compared to the votes of others.

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[1] This brief is filed with the consent of all parties. No counsel for a party in this Court authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund its preparation or submission.

Not only does such a rule reflect the principle on which this Court's one-person, one-vote precedents is based, but it is fully consistent with, indeed compelled by, the idea of sovereignty reflected in both the Declaration of Independence and in the Constitution, both as originally ratified and as subsequently amended.

ARGUMENT

I. This Court's "One-Person, One-Vote" Jurisprudence Has Rightly Focused on *Voters* and *Citizens*.

In *Reynolds v. Sims*, this Court held "that the Equal Protection Clause guarantees the opportunity for equal participation by all *voters* in the election of state legislators," "[s]ince the achieving of fair and effective representation for all *citizens* is concededly the basic aim of legislative apportionment." 377 U.S. 533, 565-66 (1964) (emphasis added). Repeatedly throughout the opinion, the Court focused on the equal rights of *voters* and *citizens*, rather than simply persons. "Undeniably the Constitution of the United States protects the right of *all qualified citizens* to *vote*," it stated. *Id.*, at 554 (emphasis added). It referred to "all qualified voters." *Id.* It spoke of the "right to vote freely" as "the essence of a democratic society. *Id.*, at 555. And it reaffirmed its holding in *Baker v. Carr*, 369 U.S. 186 (1962), that a claim "that the right to vote of certain *citizens* was effectively impaired since debased and diluted" "presented a justiciable controversy." *Id.*, at 556 (emphasis added).

Additionally, relying on its prior decision in *Gray v. Sanders*, the *Reynolds* Court referenced the constitutional command that, when exercising "the voting power," "all who participate in the election are to have

an equal vote. . . ." *Reynolds*, 377 U.S., at 557-58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963). It repeated the passage from *Gray* noting that the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications," again focusing on voters. And it reaffirmed that the "idea that *every voter* is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court's] decisions." *Id.*, at 557-58.

Similarly, relying on its prior decision in *Wesberry v. Sanders*, the *Reynolds* Court stated that "the Federal Constitution intends that when *qualified voters* elect members of Congress *each vote be given as much weight as any other vote* . . . ." *Id.*, at 559 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964)). "[T]he constitutional prescription for election of members of the House of Representatives 'by the People,'" it added, "'means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.'" *Id.*, at 559. And it drew the conclusion from *Gray* and *Wesberry* that "one person's vote must be counted equally with those of all other *voters* in a State." *Id.*, at 560 (emphasis added).

This emphasis on "voters" and "citizens" has been reiterated time and again in subsequent decisions by this Court. For example, when "calculating the deviation among districts," this Court noted in *Board of Estimate v. Morris*, "the relevant inquiry is whether 'the *vote of any citizen* is approximately equal in weight to that of any other citizen.'" 489 U.S. 688, 701 (1989) (emphasis added, quoting *Reynolds*, 377 U.S., at 579). "The object of districting is to establish 'fair

and effective representation for all *citizens*.'" *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds*, 377 U.S., at 565-68). "[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that *equal numbers of voters* can vote for proportionally equal numbers of officials." *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). "[I]n voting for their legislators, all *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight." *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977). *See also Bush v. Gore*, 531 U.S. 98, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or *dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise'") (emphasis added, quoting *Reynolds*, 377 U.S., at 555). In sum, this Court has repeatedly recognized that the protection afforded by the one-person, one-vote principle is for "groups constitutionally entitled to participate in the electoral process." *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

To be sure, elsewhere in the *Reynolds* opinion, this Court spoke of "equal numbers of people." *Reynolds*, 377 U.S., at 561. "Legislators represent people, not trees or acres," it famously said. *Id.*, at 562. It described the constitutional mandate as "one of substantial equality of population," noting that districts should be "apportioned substantially on a population basis" and that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as

is practicable." *Id.*, at 559, 577.

But with these references, the Court was treating "people" synonymously with "citizens," "voters," and "constituents." *See id.*, at 577 ("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or *citizens*, or *voters*") (emphasis added); *id.*, at 562-63 ("the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of *constituents* is identical" to a scheme which gives some voters more votes than others); *see also Burns*, 384 U.S., at 91 ("At several points [in *Reynolds*], we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population"). This was undoubtedly due to the fact that, at the time, there was not a significant variation across districts between total population, citizen population, and voter population. *See, e.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that "a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State"), *aff'd*, 382 U.S. 4 (1965); *cf. Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa").

More fundamentally, this Court in *Reynolds* described "equality of population" as a means to the end of equal voting power of citizens, not an end in and of

itself. "[T]he overriding objective must be substantial equality of population among the various districts," the Court held, "*so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579 (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 744 (1973); *Mahan v. Howell*, 410 U.S. 315, 322 (1973); *Burns*, 384 U.S., at 91 n. 20; *Connor v. Finch*, 431 U.S. 407, 416 (1977). It described "population" as "*the starting point* . . . in legislative apportionment controversies." *Reynolds*, 377 U.S., at 568 (emphasis added). Although it also said that "population" was "the controlling criterion," it immediately thereafter referred again to "[a] citizen, a qualified voter,"[2] *id.*, and subsequently noted that its "discussion [in *Reynolds*] carefully left open the question what population was being referred to," *Burns*, 384 U.S., at 91. Moreover, the *Reynolds* Court explicitly held that "The Equal Protection Clause demands no less than substantially equal state legislative representation for *all citizens*."

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[2] It is conceivable that an unequal distribution of "citizens" as compared to "qualified voters" in a redistricting plan could also lead to a vote dilution claim. There could be a significant disparity in the number of children across districts, for example, or the number of voting-ineligible felons. Whether the population of "citizens" or "eligible voters" in such a circumstance should serve as the denominator in the one-person, one-vote calculus is therefore an interesting question. It might even be a non-justiciable political question, since there are perfectly valid arguments from a representation-of-the-body-politic perspective in favor of each rule. In either event, those issues are not presented by this case, which deals only with a significant disparity in the distribution across districts of those who are not citizens (including those who are not lawfully present in the United States at all) and therefore not part of the body politic whichever population base—"citizens" or "eligible voters"—is the appropriate metric.

Reynolds, 377 U.S., at 568. "Weighting the votes of *citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable," the Court added. *Id.*, at 563.

Indeed, the *Reynolds* Court found it hard to imagine that the Founders would have countenanced a districting system that afforded differential weight to the votes of some citizens at the expense of others:

> We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . .

Id., at 563-64 (quoting *Wesberry*, 376 U.S., at 8). And lest there be any confusion that by the word "inhabitants" the Court meant anything other than "citizens," it included a quotation from James Wilson's Lectures on the Constitution, in which Wilson described what was required for an election to be "equal":

> (A)ll elections ought to be equal. Elections are equal, when a given number of *citizens*, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

Reynolds, 377 U.S., at 564 n.41 (quoting *Wesberry*,

376 U.S., at 17, in turn quoting 2 The Works of James Wilson 15 (Andrews ed. 1896)).

In sum, by repeatedly focusing on "citizens" and "voters" as the object of the one-person, one-vote principle this Court has derived from the Equal Protection Clause, *Reynolds* and its progeny requires that districts be fashioned based on an equal number of citizen-voters, not a broader understanding of "population" that includes non-citizens, particularly non-citizens who are not lawfully present in the United States. That is why, in *Burns*—the only case in which this Court was presented with factual circumstances where the distribution of total population and voting population differed significantly from one district to the next—this Court upheld a districting plan with wide divergence in total population across districts, because the districts were approximately equal in the number of registered voters (which, in that case, was a close proxy for the eligible voter/citizen population). As Judge Kozinski has correctly noted, although "*Burns* does not, by its terms, purport to *require* that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza*, 918 F.2d, at 784 (Kozinski, J., concurring and dissenting in part).

II. The Political Theory of the Founding, Embodied in Both the Declaration of Independence and the Constitution, Fully Supports Voter-Based Reapportionment.

A. The Declaration of Independence established a "People," and it is that People

whose consent is necessary for the legitimacy of the government they established.

At the very outset of the Declaration of Independence, our Founders announced to the world that "one people"—the American people—were "dissolv[ing] the political bands" that had previously "connected them with another" people and "assum[ing] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." Decl. of Ind. ¶ 1. They then articulated a set of principles that, though universal in their reach, provided the rationale for that particular "one people" legitimately to declare independence and to institute a new Government that they believed would be more conducive to their safety and happiness. The key to their philosophic claim was the self-evident truth of human equality, and the corollary truth which flows from it, namely, that governments derive "their just powers from the consent of the governed." *Id.*, ¶ 2.

Combining those two basic ideas—that earthly governments are not universal in their reach but rather are created by particular subsets of people, and that in order to be legitimate, they must be based on the consent of those they would govern—it becomes evident that the one-person, one-vote principle articulated by this Court in *Reynolds* must necessarily be tied to "the people" who form the body politic, not some undifferentiated total population that includes those who are not part of the body politic. Citizens, or those who are eligible to be voters, are "the people" who give the government legitimacy by their consent. They are the people who are the ultimate sovereign in *this* county, who are represented in *our* Congress, and

whose votes should not be diluted when compared to other citizen-voters who happen to live in districts with a significantly larger number of non-citizens living (whether temporarily or illegally) in their midst.

In other words, once this Court recognized that the Equal Protection Clause of the Fourteenth Amendment requires close parity in the apportionment of legislative districts, the principles of the Declaration require that the parity be based on citizen-voters. The interpretation of *Reynolds* and its progeny that Plaintiffs have urged, and that we urge in Part I above, is the only reading that is consistent with those principles.

B. The Constitution's preamble and "Indians Not Taxed" clause also support a Citizen/Voter-based interpretation of the one-person, one-vote rule.

Critical language in the Constitution further demonstrates that the one-person, one-vote rule should be based on voting-eligible population, not a total population that includes non-citizens. The preamble begins with "We the People of the United States," for example, not the people of the world, or any foreign nationals who happen to be in the United States when a census is taken. U.S. Const., Preamble.

The representation clause of Article I embodies the same citizenship-based understanding of "the people." Even as modified by the Fourteenth Amendment to remove the three-fifths compromise with the institution of slavery that existed at the time the Constitution was adopted, representation is based not on "all persons," but on "the whole number of persons in each

State, *excluding Indians not taxed*." U.S. Const. Amend. XIV, § 2 (emphasis added); *see also* U.S. Const. Art. I, § 2, cl. 3 (apportioning "Representatives and direct Taxes" "among the several States" based on "their respective Numbers . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed*, three fifths of all other Persons") (emphasis added). Thomas Jefferson used similar language in his proposal for Articles of Confederation, in the clause apportioning "All charges of war & all other expenses that shall be incurred for the common defense and general welfare," to the "several colonies in proportion to the number of inhabitants of every age, sex & quality, except Indians not paying taxes." Thomas Jefferson, Autobiography (1821), in Paul Leicester Ford, ed., THE WORKS OF THOMAS JEFFERSON, Vol. I:43-57 (1904), *reprinted in* Philip B. Kurland & Ralph Lerner, THE FOUNDERS' CONSTITUTION, Vol. 2, p. 87 (1987).

"Indians not taxed" were excluded from the apportionment of representation (and of taxes) because they were not part of the body politic of the United States, instead owing their allegiance to their particular tribal governments. As this Court noted in *Elk v. Wilkins*, "Indians not taxed are . . . excluded from the count, for the reason that they are not citizens." 112 U.S. 94, 102 (1884); *see also Cherokee Nation v. State of Ga.*, 30 U.S. 1, 42-43 (1831) ("If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers"). By contrast, Indians who "were taxed to support the government"—that is, were part of the

body politic—"should be counted for representation." *United States v. Kagama*, 118 U.S. 375, 378 (1886).

What this demonstrates is that representation in the national government was not apportioned among the states based on total population, but only on that part of the population which comprises or becomes part of the body politic. *Cf. Foley v. Connelie*, 435 U.S. 291, 295 (1978) ("A new citizen has become a member of a Nation, part of a people distinct from others" (citing *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 559 (1832)). Today, temporary sojourners, particularly those who are not lawfully present in the United States at all, stand in the same position with respect to representation in government as those "Indians not taxed" did at the time of the Founding. They owe allegiance to another sovereign, and are therefore no part of *this* body politic, no part of the "groups constitutionally entitled to participate in the electoral process" here. *Burns*, 384 U.S., at 92. To count them in the apportionment process, at least when they are unevenly distributed across districts, is necessarily to dilute the votes of some portion of the body politic—of the citizenry—at the expense of another portion. That would violate the *principle* of *Reynolds*, the same principle to which the Founders gave effect by including in their reapportionment calculus only members of the body politic.

III. The Civil War Amendments Themselves Give Heightened Protection to "Citizens," Recognizing the Importance of Membership in the Body Politic For the Exercise of Political Rights.

The one-person, one-vote rule of *Reynolds* is based

on the Fourteenth Amendment, of course, but that Amendment (as well as the Fifteenth) itself recognizes a distinction between "citizens" and "persons." "No State shall make or enforce any law which shall abridge the privileges or immunities *of citizens* of the United States," but a State may not "deprive any *person* of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

The same distinction exists in the citizenship clause, albeit more subtly. "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." *Id.* (emphasis added). As described by Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, "subject to the jurisdiction" meant subject to the "complete" jurisdiction of the United States, "[n]ot owing allegiance to anybody else." CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now." *Id.*, at 2895. The rule in place when he made that statement was the 1866 Civil Rights Act, which provided that "all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." Civil Rights Act of 1866 § 1, ch. 31, 14 Stat. 27 (emphasis added).

To be sure, the Equal Protection Clause on which the *Reynolds* holding is based applies to "persons," not

just citizens, but the heightened scrutiny this Court uses when reviewing Equal Protection challenges to classifications based on alienage does not apply when those classifications involve the political rights of citizens. *See, e.g., Foley*, 435 U.S., at 295-96 ("we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions,' as part of the sovereign's obligation 'to preserve the basic conception of a political community'" (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647-48 (1973)). As this Court explained in *Sugarman*, the more lenient Equal Protection review of alienage classifications in the political context "is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions." *Sugarman*, 413 U.S., at 648 (citing *Pope v. Williams*, 193 U.S. 621, 632-34 (1904); *Boyd v. Thayer*, 143 U.S. 135, 161 (1892)). Indeed, this Court has even said "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'" *Foley*, 435 U.S., at 295-96 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C. J., dissenting)).

Accordingly, in *Foley*, this Court upheld against an Equal Protection challenge a state law making citizenship a qualification for police officers, 435 U.S., at 300. The year before, it had upheld a state law excluding aliens from jury service. *Perkins v. Smith*, 370 F.Supp. 134 (Md.1974), *aff'd*, 426 U.S. 913 (1976). And the following year it upheld a state law making citizenship a qualification for public school teachers.

Ambach v. Norwich, 441 U.S. 68 (1979). In fact, this Court reviews most state classifications based on alienage under heightened scrutiny precisely because "aliens—pending their eligibility for citizenship—have no direct voice in the political processes." *Foley*, 435 U.S., at 294 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)). And it has specifically "recognize[d] a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" *Sugarman*, 413 U.S., at 642 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)); *see also Sugarman*, 413 U.S., at 648 n.13 (acknowledging the "clear evidence" from the "congressional debates leading to the adoption of the Fourteenth Amendment" "that Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the amendment they did not receive a constitutional right of suffrage or a constitutional right to participate in the political process of state government") (citing Cong. Globe, 39th Cong., 1st Sess., 141-42, 2766-67 (1866)).

Section 1 of the Fifteenth Amendment likewise recognizes the preferred position of "citizens" in the political process: "The right of *citizens* of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. The same is true of the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which provide that the "right of *citizens*" to vote shall not be denied or abridged on account of sex, failure to pay a poll tax, or age for those above 18, respectively.

U.S. Const. Amends. XIX, XXIV, XXVI.

Section 2 of the Fourteenth Amendment is particularly germane. That section first modifies the representation clause of Article I, Section 3 to eliminate the references to slavery, but it retains the language apportioning representation among the States according to the numbers of "persons in each State, excluding Indians not taxed." U.S. Const. Amend. XIV, § 2. Immediately following that sentence, and textually tied to it, the second sentence provides: "But when the right to vote [for federal or state representatives and other officers] is denied" to any citizens of voting age (male citizens at the time, but including female citizens since passage of the Nineteenth Amendment) "*or in any way abridged*, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such . . . citizens shall bear to the whole number of . . . citizens [of voting age] in such State."

It would be anomalous indeed if the reapportionment process itself were to be the cause of "citizens" having their right to vote "abridged." The only way to avoid that anomaly under the *Reynolds* one-person, one vote regime is to require that districts be apportioned by reference to citizens/voters, not total population, at least where, as here, there is significant divergence between the two. Quite simply, because "the right to govern is reserved to citizens," *Foley*, 435 U.S., at 297, the right to an equal, undiluted vote to decide who will govern must likewise be "reserved to citizens."

CONCLUSION

The district court's judgment denying relief on Plaintiffs' claim that the significant vote dilution that occurs when non-citizens are included in the reapportionment process and unevenly distributed across districts is unconstitutional should be reversed.

Respectfully submitted,

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